No. 435 and 4 Orig.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

Filed Dec. 5, 1898.

No. 435.

JAMES NICOL,
Appellant,

vs.

JOHN AMES, United States Marshal for the Northern District of Illinois,
Appellee.

Appeal from Circuit Court for the Northern District of Illinois.

No. 4, Original.

EX PARTE; IN THE MATTER OF GEORGE R. NICHOLS,
Petitioner.

Petition for Writ of Habeas Corpus.

BRIEF AND ARGUMENT FOR APPELLANT AND PETITIONER.

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IN THE

Supreme Court of the United States.

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STATEMENT.

The only question in these cases is the constitutionality of those parts of the new Revenue Act of June 13, 1898, which (1) require every seller of products upon an exchange or board of trade to deliver to the buyer a written memorandum or other evidence thereof, and (2) impose a stamp tax on every such memorandum. That act, so far as material, is as follows:

ADHESIVE STAMPS.

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

SCHEDULE A.

STAMP TAXES.

"Upon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: PROVIDED, that on every sale or agreement of sale, or agreement to sell, as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps, in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax, as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or

agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court."

The Case of James Nicol.

This appellant, being a citizen of the State of Illinois and a member of the Chicago Board of Trade, sold upon that exchange for immediate delivery at Chicago to one Milne, also a citizen of that state, two carloads of oats then in Chicago, *without making or delivering to said buyer any bill, memorandum, agreement or other evidence of such sale showing the date thereof, the name of the seller, the amount of the sale and the matter or thing to which it referred.*

Upon an information by the district attorney setting out these facts being filed in the *District* Court at Chicago, a bench warrant issued, and after appellant's motion to quash upon the ground that these parts of the act were unconstitutional had been overruled, as well as his demurrer and motion in arrest based upon the same ground, he was duly convicted and committed to the county jail until he paid a fine of $500. Being taken into custody by the marshal, he applied to the Circuit Court at Chicago for a writ of *habeas corpus* upon the ground that the act under which he had been convicted was unconstitutional. The Circuit Court granted the writ, and admitted appellant to bail pending a

hearing, but upon the return to the writ decided the act constitutional (Opinion, Record, p. 20), and remanded him to custody. Thereupon he was allowed and perfected the present appeal, and was by the Circuit Court again admitted to bail pending the appeal.

The only error assigned is the Circuit Court's refusal to decide the act unconstitutional and discharge appellant.

The Case of George R. Nichols.

This petitioner, also a citizen of Illinois, and a member of the same board of trade, sold for immediate delivery at Chicago to one Roloson, also a citizen of that state, ten tierces of hams for $195, delivering to the buyer the written memorandum required by the above act, *but failing to affix thereto the stamp required by it.*

Upon an information by the district attorney setting up these facts, and other proceedings in the *Circuit* Court at Chicago similar to those in the District Court in the case of James Nicol, the petitioner was fined $500 for failure to affix such stamp, and committed to jail until its payment. Being taken into custody by the marshal, petitioner applied to this court for leave to file the present petition for a writ of *habeas corpus*, seeking a discharge upon the ground that the above act, so far as it imposed the tax in question, is unconstitutional. Leave was given, a rule upon the respondent to show cause was entered, and a return has been filed, submitting the case upon the allegations of the petition.

By order of this court these two cases are to be heard as one case, and will therefore be discussed in one brief.

In support of a reversal in the first case and a writ of *habeas corpus* in the second, this brief urges the following:

POINTS.

I.

Habeas corpus is the proper remedy where the prisoner is in custody upon conviction for an offense created by an unconstitutional law.

Ex parte Siebold, 100 U. S., 371.
Ex parte Royall, 117 U. S., 248.
In re Coy, 127 U. S., 758.
In re Neilsen, 131 U. S., 182.

II.

The Circuit Court, having in both cases upheld the constitutionality of the present law, and having, in the case of James Nicol, denied a writ of *habeas corpus*, an application by George R. Nichols to that court would have been useless; hence an application by him directly to this court is in accordance with its practice.

Ex parte Terry, 128 U. S., 289-302.
Sawyer's Case, 124 U. S., 200.
Ex parte Bain, 121 U. S., 1.
In re Tyler, 149 U. S., 164.
In re Ayres, 123 U. S., 443.

III.

THE TAX IN QUESTION, IF AN INDIRECT TAX, IS A STAMP TAX UPON DOCUMENTS.

It is not a privilege tax. A commercial exchange is a voluntary association (the Chicago Board of Trade,

although incorporated, has been decided to be such—*Board of Trade* v. *Nelson*, 162 Ill., 431), and neither the privilege of being a member of an exchange nor of having one's property sold there, nor of being a seller there, is a privilege in the legal sense—that is, a taxable privilege.

Mayor v. *Guest*, 40 Tenn. (3 Head.), 414.
Cooley on Taxation, 2nd Ed., 571.
Charleston v. *Oliver*, 16 S. C., 47.

Nor is this an occupation tax—such a tax being imposed elsewhere in this act upon brokers, and the law not presuming double taxation.

Cooley on Taxation, 227.
Board v. *Gas Light Company*, 64 Ala., 273.

Nor is it a tax on sales, which would in reality be a tax on the commodity sold.

Cook v. *Pennsylvania*, 97 U. S., 566.
Brown v. *Maryland*, 12 Wheaton, 419.

For agreements to sell for future delivery are taxed and in these there is usually no commodity to tax, such contracts, although generally settled by the payment of differences, being legal—

Bibb v. *Allen*, 149 U. S., 499;
Miles v. *Andrews*, 40 Ill. App., 155.

and, whether legal or not, would be taxable—

License Taxes Cases, 5 Wall., 463;

Almy v. *California*, 24 How., 169, as construed by *Woodruff* v *Parham*, 8 Wall., 123, is not in conflict with the proposition that this is a stamp tax only.

IV.

CONGRESS IS WITHOUT CONSTITUTIONAL POWER TO REQUIRE WRITTEN MEMORANDA OF INTRA-STATE CONTRACTS OR TRANSACTIONS.

This act, by imposing a penalty and creating a misdemeanor, prohibits oral sales or contracts of sales, and thereby interferes with intra-state commerce—this regardless of whether it makes the sale void or not

Brown v. *Maryland*, 12 Wheaton, 433.

Congress cannot regulate intra-state commerce.

United States v. *De Witt*, 9 Wall., 44.
Lane County v. *Oregon*, 7 Wall., 76.

Nor can it do this as a "necessary and proper" means of levying taxes.

"Necessary and proper," under sub-clause 18, Sec. 8, of the Constitution authorizes only such laws as are (1) "appropriate and plainly adapted" to the levying of the tax, and (2) "consist with the spirit of the constitution."

McCulloch v. *Maryland*, 4 Wheaton, 316.
Legal Tender Cases, 12 Wall., 457.

But the only purpose of requiring written memoranda is to increase the number of such documents to be taxed, which is not a proper incident to the taxing power.

United States v. *De Witt*, 9 Wall., 42.
License Cases, 5 Wall., 463.

Congressional interference with state commerce, in whatever form or degree, is to be as much condemned as

has been state interference, in whatever form or degree, with inter-state or foreign commerce.

Henderson v. *Mayor*, 92 U. S., 271.
Webber v. *Virginia*, 103 U. S., 350.
Pickard v. *Pullman*, 117 U. S., 35.
Robbins v. *Shelby Taxing District*, 120 U. S., 489.
Moran v. *New Orleans*, 112 U. S., 69.
Leloup v. *Mobile*, 127 U. S., 641.
Almy v. *California*, 24 How., 169.
Guy v. *Baltimore*, 100 U. S., 434.

This interference with oral contracts within a state does not "consist with the spirit of the constitution."

Moore v. *Moore*, 47 N. Y., 467.
Sammons v. *Halloway*, 21 Mich., 163.
Craig v. *Dimock*, 47 Ill., 310.
Davis v. *Richardson*, 45 Miss., 500.
Forcheimer v. *Holly*, 14 Fla., 243.
Sporrer v. *Eifler*, 57 Tenn. (Heisk), 633.
Duffy v. *Hobson*, 40 Cal., 240.
Carpenter v. *Snelling*, 97 Mass., 452.

Such legislation, if independent of a tax law, would be class legislation, because depriving some, but not all, of the right to contract orally.

Millet v. *People*, 117 Ill., 298.
Harding v. *People*, 160 Ill., 459.
Florrer v. *People*, 141 Ill., 171.
State v. *Goodwill*, 33 W. Va., 179.
Godcharles v. *Wigeman*, 113 Penn. State, 431.

Kuhn v. *Common Council*, 70 Mich., 537.
Application of Jacobs, 98 N. Y., 98.
Butchers' Union v. *Crescent City Co.*, 111 U. S., 746.
Barbier v. *Connolly*, 113 U. S., 703.
Yick Wo v. *Hopkins*, 118 U. S., 356.

If the right to thus discriminate respecting oral contracts be sustainable at all, it can only be when it is *necessary* to taxation, and not where, as here, it is neither necessary or usual. In the latter case it is clearly contrary to the "spirit of the constitution." It takes from a taxpayer, *as a part of his tax*, his constitutional right to contract or trade orally as others do.

A liberal construction is to be resorted to for the protection of constitutional rights.

Boyd v. *United States*, 116 U. S., 635.
Navigable Co. v. *United States*, 148 U. S., 325.
Oakley v. *Aspinwall*, 3 N. Y., 547.

V.

THIS TAX, IF A STAMP OR OTHER INDIRECT TAX, VIOLATES THE RULE OF UNIFORMITY.

The constitution requires not merely "geographical uniformity," but practical uniformity between taxpayers, which means, not that all persons or all property must be taxed, if any are, but that all persons similarly situated, and all property of the same kind, be proportionately taxed, if any such person or property is taxed.

This construction is required by the state of history

and political economy at the time of the adoption of the constitution, as well as by the circumstances attending the insertion of this uniformity clause in the constitution.

The power to tax implies the power to destroy.

McCulloch v. *Maryland*, 4 Wheaton, 431.

Weston v. *Charleston*, 2 Peters, 449.

Loan Association v. *Topeka*, 20 Wall., 655.

Uniformity has been defined as above by this court in:

United States v. *Singer*, 15 Wall., 111.

Head Money Cases, 112 U. S., 580.

This rule of taxation requires an essential difference between the subjects taxed and those untaxed.

Pacific Ex. Co. v. *Siebert*, 142 U. S., 339.

Senior v. *Ratterman*, 44 Ohio St., 661.

This does not arise from the mere difference of locality of a sale of the thing taxed, nor from greater convenience attending the making of such sale.

ARGUMENT.

I.

THIS TAX, IF AN INDIRECT TAX, IS A STAMP TAX ON DOCUMENTS.

This court, adopting substantially the classification given by Turgot, has said of the subjects of taxation:

"These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures and in transportation."

State Tax on Foreign-held Bonds, 15 Wall., 300, 319.

The Federal constitution, speaking more with reference to the forms, than the subjects, of taxation, makes a division into, taxes (seemingly meaning only direct taxes), duties, imposts and excises, and separates the first from these other classes by prescribing for it the rule of apportionment, and for them the rule of uniformity.

As the question whether the present be a direct or indirect tax will be discussed in the brief of our associate counsel, it is not the purpose of this brief to consider it. The present aim is to show that—assuming it to be an indirect tax—it is a stamp tax on documents and nothing else.

All will agree that this tax, if an indirect tax, is either a duty, an impost, or an excise.

That it is not a tax upon the members of, or memberships in, an exchange will hardly be disputed. If intended as such, it would have been laid on all its members—not only upon such as are sellers, but the many such members who, as the uncontradicted averments of the petitions show, only buy on an exchange and hence escape this tax.

Nor can any form of indirect federal taxation be conceived that will reach members of voluntary associations, or the privilege of membership therein. As well attempt to tax the members of, or membership in, social clubs. An exchange is a voluntary association of merchants for convenience in trading (*Chicago Board of Trade* v. *Nelson*, 162 Ill., 431), just as a social club is a voluntary association of men for social advantages; and members, or membership, neither are proper subjects of federal taxation.

Nor is this tax—the Circuit Court to the contrary notwithstanding—a tax upon a privilege. That privileges—using the term in its legal sense—are taxable, is not denied. But a privilege, in the ordinary sense in which that term is used, when, for instance, we speak of the "privileges and immunities of citizens," is not taxable as such. Thus, the privilege of congenial companionship, of purchasing at a store, or enjoying the accommodations of an hotel by paying for them, and the many other advantages or privileges which all enjoy alike, and which are not confined to a few, nor based upon a special governmental grant, are not subject to what is called a privilege tax.

It is settled that a privilege, in this sense, is not taxable as such.

Mayor v. *Guest*, 40 Tenn. (3 Head.), 414.
Cooley on Taxation, 2nd Ed., 571.
Charleston v. *Oliver*, 16 S. C., 47.

If such privilege related strictly to the person, the tax upon it would be in the nature of a capitation tax. If it appertained to property, the tax upon it would in effect be a tax upon such property. Thus a tax upon the privilege of having one's property sold upon an exchange—a privilege all may enjoy on all exchanges by paying for it—would be but a tax on the sales at such exchange, or more accurately, a tax upon the property when sold there.

A privilege, in the legal sense, is defined by the Century Dictionary as:

"A special and exclusive right conferred by law on particular persons or classes of persons, and ordinarily in derogation of a common right,"

and by the Encyclopedia Brittanica as follows:

"A privilege in law is an immunity or exemption conferred by special grant in derogation of a common right."

As thus defined, privileges are taxable. Of this character is the franchise or privilege of being a corporation, and privilege-taxes thereon this court has frequently recognized. Thus defined, a privilege tax cannot apply to the so-called privilege (common to all) of having one's property sold on an exchange, nor the so-called privilege—not emanating from any governmental grant—of being a member of a social club or of a voluntary commercial association formed, not for pecuniary profit, but for convenient trading.

But the learned Circuit judge, in calling this a privilege

tax, refers not to the privilege of having one's commodity sold on an exchange, or of being a member of such exchange, but to the privilege of being a seller thereon. "This privilege," he says, "is itself a property or thing of value." It is doubtless of pecuniary advantage where the right to sell on an exchange is confined to its members, and is only exercised for outsiders upon payment of a commission, for then the owner selling his own commodity thereon saves a commission, and the broker selling for another earns one. But this is not so in exchanges that are open to all sellers, such as the Chicago Live Stock Exchange, which (as Judge Grosscup has recently correctly decided) the language of this act includes.

Again, if this be a tax upon the privilege of being a seller on an exchange, then it follows that the tax is payable by the broker and not by his principal—as indeed the learned Circuit judge decided. But on this point even the Government differs from him; for the present Commissioner of Internal Revenue—acting doubtless under instructions from the law department of the Government—has, since Judge Showalter's decision, ruled that the tax is payable, not by the broker, but by the principal. We refer to the ruling of such Commissioner promulgated November 5, 1898, as follows:

"That in case of a broker who is a member of the Board of Trade negotiating a sale of grain or produce on the Exchange as a broker for a principal, the principal afterwards assuming the trade, the broker is required to deliver and pay a ten-cent tax on his note or memorandum of sale, and the principal is required to pay a tax on the sale at the rate of one cent on each $100 of the amount or fractional part of $100 in excess of $100."

In this the Commissioner is undoubtedly right. The

law nowhere speaks of *sellers*, but of "each sale, agreement of sale, or agreement to sell," on an exchange, thus contemplating, as the Commissioner holds, the payment of the tax by him whose property is sold, and not by the broker, who is in no legal sense a party to such sale or agreement. Every tax law should, as this does, clearly specify the incidence of the tax so as to avoid uncertainty as to who shall pay it.

Again, how can the privilege of being a seller for oneself, or for another, be, in this legal sense, a privilege subject to taxation? It cannot be said to emanate from the state. It arises, not by reason of any act of incorporation, for exchanges need not be incorporated. It results from the concurrent desire of a number of traders in the same line of business to rendezvous at a convenient place during the business hours of a day to more conveniently trade. This is the origin of these voluntary associations. The state law confers no right or privilege upon them, and probably could not constitutionally prevent their members from thus meeting together in trade. Some of these associations own buildings and some hire rooms for trading purposes. Many, doubtless, have not, and none need, any special grant of the right to thus assemble. Even in incorporated associations, the only grant is the right to be a corporation, which could be taxed only by means of a franchise tax, which this concededly is not.

Again, this so-called privilege which the learned Circuit Judge has in mind is in reality not the privilege of selling, but the privilege of trading; that is, buying or selling on an exchange. Those, whose only business it is, as we have seen, to *buy* on exchanges, enjoy identically the same advantages or so-called privilege as those whose

business it is to *sell* thereon. In the case of an exclusive exchange, one who buys for himself saves a commission, and one who buys as broker for another earns one in the same way that a selling member does. Hence this cannot have been intended to be a tax upon the so-called privilege of being a seller, because as *such* it would violate the rule of uniformity in not also taxing those who enjoy the like privilege of being buyers on an exchange.

Again, has not the learned judge here confounded a privilege tax with an occupation tax? Is not the exercise of the so-called privilege of trading on an exchange in reality but the pursuit of an occupation, and is not a tax on it sustainable only as a tax on an occupation? But a tax on an occupation is in reality a tax upon him who exercises such occupation. It is a tax on persons and not on things; whereas, the present tax is one upon things and not persons, as is very plain from a reading of Section 6, quoted at the opening of this brief.

That it is not an occupation tax is strongly reinforced by the second section of the present law, which provides for special taxes upon persons exercising certain occupations. If the intention had been to tax the occupation of traders or sellers on an exchange, Congress would have included them in this section, and, not having done so, the conclusion is irresistible that it did not intend to tax them.

Furthermore, this second section of the act does now tax as "commercial brokers" every person "whose business it is as a broker to negotiate sales or purchases of goods, wares, produce, or merchandise." Having thus once taxed selling brokers on exchanges, it is inconceivable that the purpose was to again tax such persons by Schedule A. That Congress intended double taxation, and especially a double occupation tax, is not to be presumed.

"It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly; and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow, as a legal conclusion, that the legislature could not have intended that the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time."

Cooley on Taxation, 227.

Board v. *Gaslight Company*, 64 Ala., 273.

Clearly, then, the tax in controversy is neither an occupation, nor a privilege, tax.

Nor is it an indirect tax on sales. The right of Congress to tax all sales of all commodities is not questioned, although it would be a direct tax, except as to consumable commodities, and even as to these, if all sales thereof were not taxed. Such a tax is an extremely vicious one because involving a repetition of the tax upon the same property every time it is sold For this reason it has rarely been resorted to. Among the few historic instances is the famous Al Cavala of Spain, a tax upon every sale of every kind of property, to which Ustaritz attributed the ruin of the manufactories of Spain, and Adam Smith the declension of Spanish agriculture.

It is also conceded that a tax on the sale of the seller's existing property is in reality, as this court has held in *Cook* v. *Pennsylvania*, 97 U. S., 566, and *Brown* v. *Maryland*, 12 Wheaton, 419, a tax upon the commodity itself.

But while Congress in its discretion may, it is not obliged to, tax the commodity itself at the time of its

sale. It may tax the means of transference as distinguished from the commodity itself.

The present law imposes a tax, not only where the seller, then owning the property, sells it, but also on agreements to sell for *future* delivery. Here Congress doubtless aimed to reach the usual speculative contracts, against which the recent proposed anti-option legislation was aimed. In these contracts, the seller does not always own the commodity at the time of the sale. Frequently he never owns it, but the contract is settled between him and the buyer by the one paying the other the difference between the contract, and the then market, price. Such contracts and settlements thereof are legal, if when the contract was made, both parties contemplated delivery. *Bibb* v. *Allen*, 149 U. S., 499. *Miles* v. *Andrews*, 40 Ill. App., 155. Whether legal or not they would be taxable. License Tax Cases, 5 Wall., 463. Hence it is clear that Congress intended—at least in future sales—to tax the contracts, rather than the commodities sold or agreed to be sold.

But on further analysis it would seem that Congress intended to impose—as it had a discretion to do—a tax upon the documents rather than upon the contracts of sale, as distinguished from such documents. The law provides no way of paying the tax other than by the purchase and use of adhesive stamps. The collectors of internal revenue can only sell stamps; they cannot otherwise receive payment of this tax. If the appellant Nicol had desired to pay a tax upon his oral sale, he could not, under this law, have done so. If sellers cannot, under this law, be constitutionally required to give memoranda of their sales, then contracts of

sale, when oral, are not taxed. Thus Congress has only intended to levy a stamp tax. While the many strictly excise duties collected by the sale of stamps are not to be regarded as taxes on the box, barrel or bottle to which the stamp is affixed, still a stamp duty, in its true sense —that is, when applied to writings, is not only in form, but in its nature, a tax on documents and nothing else.

Here we do not overlook the statement in the opinion of this court in *Almy* v. *California*, 24 Howard, 169, that a stamp tax on a bill of lading is a tax on the property it represents. In that case the legality of a state stamp tax upon a bill of lading issued upon a shipment from one state to another was questioned. As pointed out in *Woodruff* v. *Parham*, 8 Wall., 123, the validity of the imposition *as a tax* was not involved, the only question in the case being whether it was a regulation by a state of commerce between the states; and in *Woodruff* v. *Parham* it is said that *Almy* v. *California* was "well decided on the ground that such a tax was a regulation of commerce." Thus, the language of *Almy* v. *California* must be confined to the question decided. That decision was clearly right, because any form of restriction on commerce is an interference therewith, and a restriction in the form of a tax on the instrumentalities of commerce is a restriction on the commerce itself. But the nature of a stamp tax, *as a tax*, is a different thing from its nature as a *regulation of commerce*. In the former case the question is, what particular kind of tax has the state—having the right to select the form of its taxation —seen fit to resort to, and what are the proper incidents or limitations of that particular tax. Neither of these questions was this court required to decide, nor did it de-

cide, in the *Almy* case. Hence, what is the nature of a stamp tax is still an open question here.

But Congress in this law has itself construed it to be a tax upon the document, and not the property or contract behind the document. For if the latter, the tax could only be imposed where such property or contract was itself subject to the tax. But this law taxes deeds of real estate. Now, if Congress intended this tax to be a tax on the real estate itself or—what is the same thing—the sale thereof, instead of a tax upon the document of transference, then this tax upon deeds would be unconstitutional because, being a direct tax on real estate, it is not laid according to the rule of apportionment. This law also taxes sales and agreements to sell shares of corporate stock. If not a document tax, this is a direct tax, and invalid under the decision of the *Income Tax* cases.

That stamp duties are taxes on documents *per se* is plain when their nature and history is examined. In the economy of taxation "stamp duties are a special class of tax entirely *sui generis*."

Dowell, History Stamp Duties, 5.

The Encyclopædia Britannica says: "A stamp duty is a tax imposed upon a great variety of legal and other documents."

The Century Dictionary defines it as: "A tax or duty imposed on the sheets of parchment or paper on which specific kinds of legal documents are written."

Webster defines it as: "A duty or tax imposed on paper or parchment."

Dowell (pp. 7, 8) also defines it as a tax on documents, and on this ground distinguishes it from duties imposed by means of stamps upon proprietary articles (such as

are contained in Schedule B of the present law), which, being upon the articles themselves, "are not stamp duties, but excise duties."

That this is a document tax becomes more apparent when its origin and history are considered. The stamp tax is said to have been invented by the Dutch in 1624 as the result of a prize being offered to any one who should discover a new kind of tax. It was first imposed in England in 1694, where it has ever since prevailed. In the advance of civilization and the development of commerce a large variety of written documents had come into use. Some were required by law, but the larger part of them rested upon necessity or convenience in the complex affairs of modern life. Thus, it has happened that, while the "vellum, parchment or paper" by itself has been of too insignificant value to sustain or justify a tax, still, with the inscription added, it has become of such utility—that is, value—to its possessor that he will stand a tax upon it rather than dispense with it. In other words, the document itself when inscribed upon has become in its nature a thing of value, and it is this "property" which is taxed by a stamp duty. Thus the tax took the character of a tax upon the document and not upon the property or contract which the document represents.

This will appear from an investigation of the different documents which have been, at different times, subject to stamp duties. A stamp tax is in its nature the same with respect to all kinds of documents to which it is applied. If as to any of them it is a tax upon a document, it is clearly so as to all of them. If in any case there is nothing but the document itself to tax, then it follows that not only in that case, but in its nature, it is a document tax, and nothing more.

Let us then consider some of the documents to which the stamp tax has been applied. In England, stamp taxes have been imposed upon pardons, reprieves, presentations, degrees in universities, dispensations, ecclesiastical licenses, writs of error, *certiorari*, *habeas corpus* and appeal, licenses and marriage certificates, depositions, bills, answers, affidavits and copies thereof, writs, decrees, judgments, citations, pleadings and copies thereof, copies of wills, protests and other notarial acts, entries of burials, marriages, births and christenings. (Dowell 23, 332.) Originally the tax was collected by requiring persons to buy from the government paper impressed with the stamp. The adhesive stamp was of more modern invention. The present law imposes a stamp tax on many documents, including all certificates required by law, telegraph messages, protests, etc. But that the present stamp tax is a document tax is admitted by the requirement in the present law of written memoranda.

Nor is this any the less a document tax because of the inverted order of expression in the second clause of Schedule A above quoted. That clause is in effect as if it read: Upon each bill, memorandum, etc., made and delivered by the seller to the buyer upon each sale, etc., at an exchange, etc., for each $100 in value, one cent, etc., and provided that on every sale, etc., as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, etc., showing the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. And any person failing to make such memorandum, or to stamp the same as aforesaid when made, shall be guilty of a misdemeanor, etc.

In further support of this it is to be noted that the clause imposing the tax (section 6 above quoted) is the customary or "stock" clause used by Congress for imposing a document stamp tax. It is the clause used in the act of July 1, 1862 (section 94), to impose such a tax. It was thence copied into section 151 of the law of 1864, imposing a like tax; thence substantially copied into the present law when imposing the same character of tax.

Hence the present tax—if an indirect one—is a stamp tax on documents.

II.

CONGRESS IS WITHOUT CONSTITUTIONAL POWER TO REQUIRE WRITTEN MEMORANDA IN INTRA-STATE CONTRACTS OR TRANSACTIONS.

This question arises only in the James Nicol case.

This act requires that on every sale or agreement to sell the seller shall deliver to the buyer a written memorandum thereof. It further prescribes what such memorandum shall contain, *i. e.*, "the name of the seller, the amount of the sale, and the matter or thing to which it refers." If it omit any of these requirements the law is violated as clearly as if no memorandum at all had been delivered. In short, this act undertakes to prescribe in detail the contractual formalities of every sale or agreement to sell any product or merchandise upon an exchange.

It is not confined to sales and contracts of inter-state commerce, but applies as well to those of intra-state commerce. Of the latter class is the sale upon which Mr.

Nicol was convicted. It was a sale by a citizen, to a citizen, of Illinois, of merchandise located, and to be delivered, in Chicago—a contract made and to be performed within that state. This law, if a regulation of, or interference with, commerce, applies to the internal commerce of a state.

A failure to deliver the required memorandum is declared by the act to be a misdemeanor punishable by a fine of not less than $500, or imprisonment not exceeding six months, or both, at the discretion of the court. Thus, this act, while not using the word "prohibit," does, as clearly as do most criminal statutes, prohibit the seller from making a sale without such memorandum, that is, from making a purely oral sale or contract to sell.

What may be the effect of this law upon the contract itself is not important. It is true, as stated by the learned Circuit judge, that "the act does not expressly declare that the oral contract in such case shall be deemed unlawful or void." It may possibly be true, as also stated by him, that this does not "follow, as a legal consequence, from what is declared," although it is difficult to see how the courts, without violating the rules of public policy, could recognize or enforce a contract, the making of which is by law made a crime.

But whether the contract itself be by this act left valid, or is made void, the question still remains whether, by what it concededly prescribes, it does not unconstitutionally interfere with the exclusive right of the states to severally regulate their internal commerce. That was the question which was submitted below and is urged here. To this question it is no answer that the act does not make the contract or sale void. If it does not, it does

declare the making of an oral contract a misdemeanor and imposes as a penalty a fine or imprisonment, or both. A citizen of Illinois, if the law be valid, can no longer make a contract or sale by word of mouth only unless willing and financially able to pay $500 for the privilege of doing so, and not averse to becoming a criminal. Under these circumstances can it be claimed that this law does not interfere with intra-state commerce?

Suppose that a state statute without either expressly—or perhaps impliedly—declaring such sales void, should make it a misdemeanor punishable by fine or imprisonment for sellers of imported goods to sell the same in original packages without taking out a state license therefor, such statute would not, if we understand the learned Circuit judge, interfere with the right of Congress to regulate foreign commerce, because it does not render the sale itself void. But this court has expressly held the contrary.

Brown v. *Maryland*, 12 Wheat., 423.

Under this case and on principle any restriction, by way of penalty or otherwise, imposed by a state upon one's right to sell an imported article in the original package, would be an encroachment upon the exclusive right of Congress to regulate foreign commerce. Conversely, any Federal restriction upon a citizen's right to sell a domestic commodity to another citizen of the same state, whether it avoids the contract or merely makes the act criminal or subject to a penalty, must be an interference by Congress with a state's right to regulate its own commerce. It follows, then, that the present act is an interference with, or regulation of, intra-state commerce, and the question then is whether the right to so interfere is authorized by the Federal constitution.

At this late day the respective powers of state and Federal governments are too well established to require the citation of authorities. In our dual government each—state and Federal—is supreme in its sphere. Each may devise its own means for the discharge of its duties and the exercise of its powers. Neither can directly or indirectly, by taxation or otherwise, impede the other in the use of such means. The Federal government is strictly one of delegated powers. All powers not delegated to it nor surrendered by the constitution remain in the states. On this last point so intense a feeling was developed among the people during the efforts to secure the adoption of the constitution, that the first Congress found it necessary to incorporate in the amendments which this court has called a "bill of rights" the following:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The constitution nowhere confers on Congress the power to interfere with, or regulate, the internal commerce of a state. The third clause of section 8 thereof confers power to

"regulate Commerce with foreign Nations and among the several States, and with the Indian tribes."

Of this provision this court has said:

"This express grant of power to regulate commerce among the states has always been understood as limited by its terms, and as a virtual denial of any power to interfere with the internal trade and business of the several states except as a necessary and proper means of carrying into execution some other power expressly granted or vested."

United States v. *Dewitt*, 9 Wall., 44.

See, also,

Lane County v. *Oregon*, 7 Wall., 76.

It will not be claimed that this requirement of written memoranda of sales, if standing by itself, and independent of any tax law, would be within the power of Congress to enact. Its constitutionality will be claimed under the following clauses of the constitution:

"Section 8. The Congress shall have power:

"1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thus, the question is whether this invasion of a state's right to regulate its internal trade is "necessary and proper" for the exercise by Congress of the power to lay and collect taxes. If not, the provision in question is unconstitutional and Nicol illegally detained in custody.

What, then, is the meaning of the words "*necessary and proper*"?

Mr. Justice Story said that they were intended to have a sense "at once admonitory and directory," and to require that the means used in the execution of an express power should be "bona fide" appropriate to the end.

2 Story on Constitution, Sec. 1253.

When the bill incorporating a national bank came to President Washington, Hamilton, differing from Jefferson, gave him a written opinion on February 23, 1791, favoring a liberal construction, and saying, (Hamilton's Work Vol. IV., p. 109, *et seq*):

"All the means requisite and fairly applicable to the

attainment of the end of such power which are not precluded by restrictions and exceptions specified in the constitution and not contrary to the essential ends of political society. * * *

If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of national authority. * * *

There is also, this further criterion which may materially assist the decision. *Does the proposed measure abridge a pre-existing right of any state or of any individual?* If it does not, there is a strong presumption in favor of its constitutionality; and slighter relations to any declared object may be permitted to turn the scale."

From this it is plain that Hamilton thought that, where a measure did interfere with a pre-existing right of a state or an individual, a presumption against its constitutionality would arise, and its necessity as an incident to a granted power ought to be clear. Subsequently, in

McCulloch v. *State of Maryland*, 4 Wheaton, 316, 420, 421,

Chief Justice MARSHALL defined these words as follows:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and *spirit* of the constitution, are constitutional. * * *

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

In the Legal Tender cases, 12 Wallace, 543, this court, in restating this definition, added:

"It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the constitution."

Hence, this prohibition of oral contracts, to be constitutional must:

1st. Be appropriate and plainly adapted to the levying and collection of taxes, and

2d. Consist with the letter and *spirit* of the constitution.

First. Is it then an "appropriate and plainly adapted" means for levying and collecting a stamp tax?

This question is, is it a proper incident to the levying, not of any kind of a tax, but of this particular form of tax? The inquiry is, not what Congress could, but what it has, taxed—not what form of taxation it constitutionally might have, but what form it actually has, exercised. Congress doubtless could, in its discretion, have taxed consumable commodities at the time of their sale, but it was not obliged to do so. Having decided not to, but instead to levy a stamp tax on documents, the question is, not what would have been incidental to such unused form of taxation, but what is properly incidental to the levying of such a tax. This is clear when we reflect that there are frequently obstacles and inconveniences inherent in the levying of certain taxes (for instance, taxes on the sale of consumable articles) which operate as a protection to the people against the exercise of that form of taxation. Doubtless

the people were not unmindful of this when they conferred upon Congress in such general terms the power to tax; and when they conferred upon it the power to levy a stamp tax they must be held to have conferred therewith only such incidental power as is appropriate to that form of taxation.

While the immediate question here is the right of Congress, in levying a stamp tax on memoranda of sales, etc., to prohibit such sales or agreements to sell on an exchange as are not accompanied by such memoranda, the real question of power here raised is much broader.

The law in question imposes also a stamp tax upon loans when evidenced by promissory notes, etc. If the question of power now now under consideration be resolved in favor of the Government, then Congress could have required all loans to be evidenced by notes or other writings in order to subject them to its stamp tax. This law taxes all brokers' notes or memoranda of sale. It could have prohibited a broker from making a sale without such note or memorandum. It taxes instruments of pledge of personal property. It could have prohibited oral pledges. It taxes every lease or agreement for the use or rent of land. It could have required every such agreement to be in writing, although most of the states permit their citizens to make short-time leases by parol. It imposes a stamp tax upon all written powers of attorney. It could have provided that no principal should confer authority upon an agent by parol. It imposes a tax upon warehouse receipts. It could have prohibited any person from becoming a bailee for storage without giving a written receipt. If Congress desired to tax—as it might—all payments of money, and preferred to do so through a stamp tax, it might, if the Solicitor

General is right, require every payer to pay by check, or give a written receipt, in order that its stamp tax might attach to such receipt or check. If it wished to tax all contracts, and preferred to do so by a stamp tax, it could require the citizens of a state—although now in most instances permitted to contract orally—to accompany *all* their contracts with written evidence thereof.

If the present law is constitutional, then Congress could do all these things, although the transactions above referred to were wholly between citizens of a state and parts of the internal commerce thereof.

So, again, while this act only requires writings concerning transactions *upon an exchange*, the real question of power here involved is much broader.

The power of Congress to tax all sales of consumable commodities—a sale on a farm, as well as a sale on an exchange—cannot be questioned. If, when selecting only the sales on an exchange for taxation, it may, as an incident to its taxing power, prohibit purely oral contracts; it may, when desiring to tax *all* sales of such commodities, prohibit under this incidental power *every oral sale or contract within a state*. This incidental power must be as extensive as the taxing power itself. It must exist as to *all* transactions between *all* citizens of a state, if it extends to any transaction of any citizen.

In other words, the position of the Government in this case must be that, in the entire domain of a state's purely internal commerce, Congress may, as an incident to its taxing power, require writings in all contracts and transactions.

That the prohibition of oral contracts is not properly incidental to the levy of a tax will be apparent, if it is con-

sidered what the taxing power really is. A tax is defined to be:

"A contribution imposed by the government on individuals for the service of the state."

Bouvier's Law Dictionary.

This contribution, in our day, takes the form of a sum of money. From a willing taxpayer this is all the state is entitled to, except, of course, such disclosure as will enable it to assure itself of the correctness of the amount. But the power to levy this contribution does not include the right to exact the surrender of something additional to the amount of the tax. Yet this is what the present law does. It also takes from the taxpayer the constitutional right—to which we shall refer more fully later—to contract and sell orally as fully as his fellow citizens can.

Again, the power to "levy and collect" this contribution does not include the power to rearrange, create or increase the subjects of taxation. Congress has no power to do this. Its power is simply to levy and collect taxes on existing subjects and resort to all "appropriate and plainly adapted" means for this purpose. In the present case Congress has merely laid a stamp tax on documents. In what way does the prohibition of oral contracts facilitate the levy or collection of such a tax? Its only conceivable bearing is that it increases the number of documents to be taxed.

If Congress can forbid oral contracts in order to increase the number of written ones to be stamped, then it may equally forbid the manufacture of one untaxed article in order to increase the supply of, and its revenue from, another that is taxed. It might under the present law, as already indicated, have required all loans,

leases, powers of attorney, bailments, etc., to be evidenced by writing in order to increase the number of documents taxable under this law. In short, Congress could control or forbid every act of internal commerce, and override every provision of state law concerning it, whenever to do so would increase its revenue from taxation.

If it can under the present law prohibit certain oral sales and contracts, it can also prohibit certain trades sanctioned by the state law in order to increase the volume of others that it desires to tax. If, in its exercise of the taxing powers, it can do this, why may it not for the same purpose authorize a business the state prohibits?

But the right of Congress, under its taxing power, to prohibit or authorize a trade in a state in order to increase its subjects of taxation has been distinctly denied by this court in two cases. One is

United States v. *Dewitt*, 9 Wall., 42.

There Congress had the power to tax all—including certain mixed—oils, as in the present case Congress had the power to tax all—including oral—sales of merchandise. There Congress preferred to tax only certain oils, as here it preferred to tax only written memoranda of sales. There Congress, to increase the quantities of oils of the kind it taxed, forbade the use of certain mixed oils it did not tax. Here, in order to increase the number of written memoranda it taxes, it forbids sales without them. There, this court denied the power of Congress, as incident to its taxing power, to prohibit certain transactions pertaining to intra-state commerce. Thus that and the present case seem to be identical, and that decision would seem to control here. This court, in deciding that case, said:

"The questions certified resolve themselves into this: Has Congress the power under the constitution to prohibit trade within the limits of a state? * * * It has been urged in argument that the provision under which this indictment was framed is within this exception [incidental power]; that the prohibition of the sale of illuminating oils described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subjects of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils, the sale of which is prohibited. If the prohibition therefore has any relation to taxation at all it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."

In the License Cases, 5 Wall., 463, the validity of certain Federal taxes on lotteries and the sale of liquors within states prohibiting them, was involved, and it was urged that by levying such taxes Congress in effect authorized liquors and lotteries, thus raising the question whether under its taxing power it could authorize lotteries and liquor sales which a state prohibited. This court, after referring to its power with respect to inter-state and foreign commerce, said:

"But very different considerations apply to the internal commerce or domestic trade of the states. Over this commerce and trade Congress had no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress

with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the constitution with only one exception, and only two qualifications. Congress cannot tax exports and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. *But it reaches only existing subjects.* Congress cannot authorize a trade or business within a state in order to tax it."

While the facts of this case are the reverse of *United States* v. *Dewitt* and the case at bar, the principle is the same. The License Cases hold that Congress, under its taxing power, cannot, in intra-state commerce, authorize what a state forbids. In the case at bar Congress has attempted to forbid what the state permits. In both cases the purpose is the same—to increase the taxable subjects. If authorizing certain intra-state trade be not an incident to the taxing power, the right to prohibit such internal trade as finds expression in oral contracts is not such incident. These two decisions of this court seem conclusive against the right under the present law to require written memoranda of sales.

But if this were, not a stamp tax on documents, but a tax on sales or commodities when sold, the result is the same. In such a tax how is the requiring of written memoranda a plainly adapted means to its levy and collection? Returns at stated periods by the seller to the collector would be. These were required by the law of 1866 respecting brokers' sales, and are required by the present law with respect

to insurance policies, etc. But the written memorandum required here is not for the inspection of the tax collector. The law imposes upon the buyer to whom it is delivered no duty respecting it. He may destroy it as soon as delivered. It in no way brings to the mind of the revenue officer the amount of the tax. The learned Circuit judge, however, suggests that its object is "to identify" the transaction. For whose benefit? The seller, who has to pay the tax, does not need to have it identified. Do not such suggestions overlook the rule laid down by this court in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S., 698, "that the substance and not the shadow determines the validity of the exercise of the taxing power"?

Would not the rule in *United States* v. *Dewitt* be equally violated, if this were a tax upon sales or commodities sold? For then would be presented a case where Congress, through a preference for a stamp tax, desired to tax such sales only as are accompanied with written memoranda, and solely to increase the number of such it prohibits all sales without them.

Here, as in the case of a stamp tax, the law improperly exacts from the citizen something additional to the amount of the tax—a constitutional and property right.

Second. Again, whether this be treated as a document tax or one upon a sale, the requirement of written memoranda must not only be "an appropriate and plainly adapted" means to the levying of such a tax, but "consist with the spirit of the constitution."

Does it meet this requirement? The spirit of the constitution is that the exclusive control of its internal commerce remains with each state—that it has the exclusive right to pass its own statutes of fraud, prescribe the

rules and formalities of the contracts and transactions of its citizens, declare the rules of devolution and transference of their property within its borders, and sanction such voluntary associations as will facilitate or increase its local trade. These are some of the reserved powers of each state, of which the people were so jealous when they adopted the "bill of rights."

This court has properly been prompt to resist every form of state interference with inter-state or foreign commerce—whether in itself hurtful to that commerce or not—whether attempted under the forms of taxation or otherwise—and "no matter how closely allied to powers conceded to be in the states," as is shown by the following cases:

Henderson v. *Mayor*, 92 U. S., 271.
Webber v. *Virginia*, 103 U. S., 350.
Pickard v. *Pullman*, 117 U. S., 35.
Robbins v. *Shelby Taxing District*, 120 U. S., 489.
Moran v. *New Orleans*, 112 U. S., 69.
LeLoup v. *Mobile*, 127 U. S., 641.
Almy v. *California*, 24 How., 169.
Guy v. *Baltimore*, 100 U. S., 434.

It will not be less ready to condemn any form of Congressional interference with a state's right to regulate its internal commerce, "no matter how closely allied to powers conceded to be" in Congress.

If the present encroachment upon the commercial power of the states were only indirect or technical, a due regard for the respective rights of state and nation would require its condemnation.

But this form of encroachment upon a state's power over

its internal commerce is not unimportant. It is much more substantial than many acts of states which this court has condemned as interfering with Congress' exclusive power over inter-state commerce. The right to prescribe the conditions under which its citizens may contract and trade is peculiarly a question for each state to decide for itself. It depends upon the intellectual capacities of its citizens. This varies in different states, and with it the question how far there should be interference with, or regulation of, contracts and trade. In prescribing such regulations an important question is, how far the citizens of a state can read and write, and how far a capacity to do so should be necessary in contracting or trading. What would be proper in one state might not, from a lower degree of intelligence, be best in another.' This assumes more importance when the extent of illiteracy in some states is considered. Thus, according to the last national census, the proportion of all persons over twenty years of age—i. e., practically of the contracting age—who could neither read nor write was; in

North Carolina	52.74%
South Carolina	48.53%
Louisiana	47.54%

Compendium of XI Census (1890), Miscellan. Statistics part III, p. 316.

In other states there is much less, though still much, illiteracy. Under these conditions to hold that Congress, in levying a tax, can prohibit the citizens of states from trading or contracting with each other unless they make written contracts or memoranda thereof—thus requiring them either to know how to write, or to employ someone to do so for them—is divesting the states of, and investing Congress with, a large and important power to regulate the internal affairs and commerce of the several states.

Is then such an invasion of a state's reserved powers consistent with the spirit of the Federal constitution? The negative of this is supported by the following cases:

Moore v. *Moore*, 47 N. Y., 467, where, the question being whether the title to real estate passed by an unstamped deed, notwithstanding the prohibition contained in a Federal internal revenue act, the court said:

"We now hold that it is not in the constitutional power of Congress to prescribe for the States the rules for the transfer of property within them. Without denying that it is within the power of taxation, conferred upon it, for Congress to lay an excise tax upon the business operations of communities, and to collect that tax by the means of stamps, to be placed upon the written instruments exchanged between contracting parties, and to enforce the observance of the law, to that end, by the imposition in it of penalties for its non-observance, we are of the opinion that it is without that power to declare that a contract or conveyance between citizens of a State, affecting the title to real estate, is void, for the reason that such observance has been omitted."

Sammons v. *Halloway*, 21 Mich., 163:

Here it was objected that a note was void for the want of a stamp, by reason of the federal revenue law of 1866, and the court, by Mr. Justice COOLEY, said:

"We have no doubt of the right of Congress to lay stamp duties, and to impose penalties, which may be collected by proper judicial proceedings, for any violation of their regulations on that subject. But to make void a contract made in one of the states between citizens thereof, and which is permitted by the local law, is not a proper penalty, and is not admissible under our political system. There is no hint of such a power in our Federal constitution, and it is inconsistent with the unquestioned right of the states to regulate in their own way the matters of local trade and commerce. What Congress might do regarding contracts which fall within the domain of foreign or inter-state commerce we do not undertake to say; but the formalities of contracts like the one in

question are matters exclusively of State regulation, and if the Federal government imposes taxes upon these inments, it *must compel their payment in some other mode than by imposing it as a condition precedent to the exercise of a right which the State, under the distribution of power by the Federal constitution, permits to its citizens.*''

In *Craig* v. *Dimock*, 47 Ill., 310, when passing upon the objection that the note sued on was not stamped as required by the Federal revenue law, the court said:

'' While, then, the power to levy taxes for the purposes indicated in the constitution may be admitted, *it cannot be admitted it can be so exercised as to take from the domain of State legislation all such subjects as are properly confided to it*, and the care of which has not been surrendered to the Congress by the states. * * *

We will not deny the power of Congress to require such instruments to be stamped, nor the consequent power to punish by fine, an intentional evasion of the law. By conceding this, we yield all that is necessary to enable the government to carry into full effect the taxing power, and at the same time sustain and uphold in its utmost limit the exclusive power of the State to say what shall be evidence in her own courts of justice in a domestic transaction wholly unconnected in every respect with the general government.''

In *Davis* v. *Richardson*, 45 Miss., 500, a similar case, the court said:

'' While the power of taxing the property, occupations and business transactions, including contracts, purely local and domestic, is asserted and sustained, yet, it does not draw with it, as an incident, the right to exceed the taxing power. Congress may punish, as it proposes to do in the acts of 1864 and 1866, for an evasion and failure to pay the tax. It may provide stringent means of collection, by sale and distress It may constitute the necessary corps of officials to execute the law, and arm them and the Federal judiciary with full authority in the premises. Under the power to 'levy and collect taxes,' all these means may be employed as incidental; but, under the taxing power, Congress cannot intervene in the states, and

impose new conditions upon the alienations and conveyances of real estate. * * *

Congress, too, may tax promissory notes or conveyances of lands, and may, by distress and sale, and penal sanctions, guard and insure the revenue. But it cannot make a deed or a promissory note that which it is not so by a local law. *Nor can it superadd formalities and terms not demanded by the local law. To hold to the affirmative would be to conduct to the result that Congress may repeal or amend state laws, pertaining to subjects purely local and domestic.*"

Other somewhat similar cases are:

Forcheimer v. *Holly*, 14 Fla., 243.
Sporrer v. *Eifler*, 57 Tenn. (Heisk), 633.
Duffy v. *Hobson*, 40 Cal., 240.
Carpenter v. *Snelling*, 97 Mass., 452.

In the case at bar the encroachment on state power is as clear as—and still more remotely connected with the taxing power than—in the foregoing cases.

In ascertaining whether the legislation in question violates the "spirit of the constitution" another consideration, already suggested, presents itself. Congress is not obliged to tax all—but may select certain classes of—persons and property. It may select certain occupations and leave others untaxed. If it may require written memoranda of transactions in these taxed occupations, then the persons engaged in such taxed occupations cannot, while persons engaged in other untaxed occupations may still, contract by word of mouth only. If the present law be uniform and valid, then Congress by it compels those selling on an exchange to use written memoranda, while those making sales elsewhere are not

required to do so. The result is that the liberty to contract is restricted in the one case and unrestricted in all others.

That a statute of Illinois whose direct purpose was to do this would violate the state constitution is no longer open to controversy. Its constitution, like most others, provides that "no person shall be deprived of life, liberty or property without due process of law." The privilege of contracting being there, as elsewhere, a part of one's liberty as well as a property right (at least when connected with the sale of property), he can not be deprived of it by a partial law affecting some, but not all, of its citizens.

Millett v. *People*, 117 Ill. 298.
Harding v. *People*, 160 Ill., 459.
Frorer v. *People*, 141 Ill., 171.

The court in the latter case saying:

"It is not competent, under the constitution, for the General Assembly to single out owners and operators of a coal mine * * * and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make."

This class legislation is also condemned as violative of their constitutions by other state courts.

State v. *Goodwill*, 33 W. Va., 179.
Godcharles v. *Wigeman*, 113 Pa. St., 431.
Application of Jacobs, 98 N. Y., 98.
Kuhn v. *Common Council*, 70 Mich., 537.

State legislation of this "class" character is also prohibited by the 14th amendment to the Federal constitution.

Butchers' Union v. *Crescent City Co.*, 111 U. S., 746.
Barbier v. *Connolly*, 113 U. S., 31.
Yick Wo v. *Hopkins*, 118 U. S., 356.

The fifth amendment of the Federal Constitution also provides that "no persons shall be deprived of life, liberty, or property without due process of law." This clause, construed as the states construe their similar provisions, would inhibit Congress from passing, as independent legislation, such class legislation in the regulation of inter-state commerce.

Whatever be the rule where *specific* grants of the Federal constitution conflict, the incidental powers granted by it ought to be so construed as not to conflict, at least unnecessarily, with the spirit of its other clauses.

Again, the constitutions in force prior to 1787 in Delaware (Poore Const.), 279; Kentucky, *id.*, 655; Maryland, *id.* 818; Massachusetts, *id.*, 958; New Hampshire, *id.*, 1282; New York, *id.*, 1335; South Carolina, *id.*, 1633; Virginia, *id.*, 1909, contained the provision, "law of the land," which is synonymous with "due process of law." (Cooley's Const. Lim., 353.)

Hence, these states, at the time they conferred on Congress the general power to tax were incapable of depriving by direct legislation certain classes only of their citizens of the right to sell or contract by word of mouth.

It being clear that a statute, whose sole province is to prohibit some, but not all, sales by word of mouth, would, as class legislation, violate the spirit both of the state and Federal constitutions, would such a provision be valid

as incidental to the power to levy a tax? Whatever the answer if it were *essential* to the taxing power, it surely ought not to be upheld when it is neither essential, nor one of the usual means by which taxes are or have been levied.

The vice of the present provision, as already indicated, is that it takes from a citizen, not only a sum of money by way of a tax, but with it a property right guaranteed by the constitution—the right to sell his property under no more onerous conditions than are imposed upon all his fellow citizens.

Is this—to use the language of Chief Justice Chase in the License Cases, *supra*, "strictly incidental to the exercise of the" taxing power? Does it "consist with the spirit of the [Federal] constitution."

Is it not just such a case as Hamilton meant (see quotation, *supra*), when he said an inquiry should be, "does the proposed measure abridge a pre-existing right of any state or of any individual?"

It is difficult to conceive that the original states, in conferring upon Congress the power to tax, intended to sanction discriminating class legislation concerning the transactions or contracts of internal trade, when this violates the spirit of their then existing, as well as their present, constitutions.

But it may be said that the present departure of Congress from its constitutional power is not hurtful or serious; that all persons on exchanges can read and write, and that requiring memoranda from them is not onerous; and that this memorandum "calls for no details of the contract," and "need not show the name of the buyer, or the times of payment, nor need it contain covenants

of any kind." (See opinion, Rec., 23.) But of such suggestions, this court, in

Boyd v. *United States*, 116 U. S., 635, and
Navigation Co. v. *United States*, 148 U. S., 325,

in speaking of acts of Congress, said:

"In may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."

Judge BRONSON, in *Oakley* v. *Aspinwall*, 3 N. Y., 547, 568, said:

"There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. * * *

One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

If Congress can, under its taxing power, deprive one of his right to contract by word of mouth only, the extent of the writing it may require is within legislative discretion. So, too, if this power exists as to sales on exchanges, it exists as to all contracts and transactions. For, as said by MARSHALL, C. J., in *Brown* v. *State of Maryland*, 12 Wheat., 419:

"Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

It is insisted, therefore, that this requirement of a written memorandum is unconstitutional.

III.

THE TAX IN QUESTION, IF A STAMP OR OTHER INDIRECT TAX, VIOLATES THE RULE OF UNIFORMITY.

This question arises in both of these cases. In the George R. Nichols case, the validity of the tax is the single question. In *Nicol* v. *Ames*, the requirement of a written memorandum can only be sustained, if at all, as an incident to the taxing power. If the principal thing —the tax—falls, because unconstitutional, the incident—the requirement of a memorandum—falls with it.

The Federal Constitution provides, section 8, that Congress shall have power,

First. "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but *all duties, imposts and excises shall be uniform throughout the United States.*"

The present law violates this provision in that it imposes a stamp tax upon memoranda of sales made at "an exchange, board of trade, or other similar place," and leaves untaxed like memoranda of similar sales made elsewhere.

This involves primarily the meaning of the words "uniform throughout the United States." This, though elaborately argued, was not defined in the Income Tax Cases. The opinions in those cases (with the exception of Mr. Justice Field's) do not discuss it, and the dissenting

opinion of Mr. Justice White says that the court was "divided upon that subject."

Two meanings are suggested for this phrase:

First. An uniformity that is simply *geographical*, and is satisfied, if the tax is the same in each state as it is in every other. It is met, however unequal and unjust the tax may be as between individual taxpayers, if this inequality be the same throughout the United States. Discrimination or inequality of taxation as between individuals or subjects taxed is here "uniformity," if it exists equally in all the states and is not created with reference to state lines.

Second. An uniformity between taxpayers—which is necessarily geographical also. This is practically synonomous with equality in taxation. It requires, not that all persons or all property shall be taxed, if any person or any property is, but that all persons similarly situated and all property of the same kind shall be proportionately taxed, if any such person or property is taxed. The subject whenever taxed must be taxed everywhere and at the same rate. If a commodity when sold is taxed, all sales of the same commodity must pay the same proportionate tax. It rejects taxation that is unequal as between taxpayers, even though not discriminating as between states.

For the sake of brevity these two meanings will hereafter be designated as "geographical uniformity" and "uniformity between taxpayers."

The meaning of this word "uniformity" as understood at the time of the adoption of the constitution is an important inquiry.

Uniformity as between taxpayers was no new or unknown principle in 1787.

Strabo, B. xiv., Chap. III, § 3, in speaking of the Lycians says they all contributed in the same proportion to taxes.

The Romans, during the siege of Veii, in Tuscany, 396 B. C., raised regular pay for their soldiers "by a general tribute assessed according to an equitable proportion on the property of the citizens." (Gibbon's Roman Empire, Vol. 1, p. 186.) And "unjust equality" in a Roman capitation tax was avoided by counting several indigent persons as one "head," while one wealthy person counted for several of these imaginary "heads." (2 Gibbon, 146.)

An edict of Charles VII of France (1445) required that equality (*égalité*) should be preserved between his subjects with regard to the charges and burdens which they had to support, so that no one might bear, or be compelled to bear, the burdens of another.

Collection des Économistes Financiéres,
Vol. 1, p. 208.

Montesquieu, in his Esprit des Lois (Livre XI, Chap. 19), 1748, commends a tax imposed by Servius Tullius, dividing the Romans into six classes and fixing a proportionate tax on each class, upon the ground that this equality (*équité*) in the levy of tribute went to the root of the fundamental principles of government.

Adam Smith (Wealth of Nations, published in 1776, book 5, Ch. 2, Pt. 2), says:

"All nations have endeavored to the best of their judgment to render their taxes as equal as they could contrive."

Boisguillebert (Détail de la France, Pt. III, Ch. 8), 1697, speaks of imposts justly spread over (*les impôts*

justement repartis), as being a law both divine and natural which is observed by all nations, even the most barbarous.

Vattel, in his Law of Nations, Bk. 1, Ch. 20, Sec. 240, page 111 (first published in England in 1760), lays down as an axiom that taxes

"ought to be regulated in such a manner that all the citizens may pay their quota in proportion to their abilities, and the advantages they may reap from society. All the members of civil society being equally obliged to contribute, according to their abilities, to its advantage and safety, they cannot refuse to furnish the subsidies necessary to its preservation, when they are demanded by lawful authority."

Burlamaqui, whose Principles of Natural and Political Law were published in England in 1748, in speaking (Vol. 2, Pt. 3, Ch. 5, Sec. 14) of the rules to govern taxes, says:

"The subjects must be *equally* charged, that they may have no just reason of complaint. A burden, equally supported by all, is lighter to every individual; but, if a considerable number be released or excused, it becomes much more heavy and insupportable to the rest. As every subject *equally* enjoys the protection of the government, and the safety which it procures, it is just that they should all contribute to its support in *proper equality*."

Adam Smith, in treating in his Wealth of Nations of the principles of taxation, 1776 (Bk. 2, Ch. 2, Pt. 2, p. 651), says:

"The subjects of every state ought to contribute towards the support of the government, as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expenses of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to

their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation."

Montyon (1733-1820) Mélanges d'Économie Politique, Vol. II, p. 476:

"L'égalité d'impôt qui fixe en ce moment nôtre attention, n'est pas celle qui doit exister entre les contribuables et entre les divers ordres de citoyens, mais l'égalite' entre les provinces faisant partie d'un même état."

The equality of taxation this author here refers to is our "geographical uniformity," thus showing that the terms "equality" and "uniformity" were used interchangably by French writers.

The distinguished French political economist and statesman Turgot (Comptroller General of Finance in France, 1774-1776) in his writing on taxes (published in 1757), Turgot, Oeuvres Complétes, Vol. I, p. 396, says:

Impositions Directes:

"Celle sur les personnes, par elle-même choque la raison; elle n'a jamais pu être imaginée que par la paresse et pour avoir plus tôt fait.
Il est impossible qu'elle soit *uniforme.*
Parcequ'il y a des gens qui n'ont rien," etc.

Here Turgot, in speaking of a direct tax on persons, clearly means by the word "uniform" uniformity between taxpayers, thus again showing that the French writers on taxation, with whom we must assume the framers of the constitution were much in sympathy, and with whose works they were, doubtless, very familiar, treat "equality" and "uniformity" as synonomous.

Other French economists who lay down the principles of equal taxation are: Quesnay, 1758; Condorcet, Fixation d'impôt, 1780; Mirabeau, Théorie

d'impôt, 1770, Jean-Baptiste Say, Traité d'Économie Politique ; Impôts Équitables.

These references, without pretending to comprise all such, are sufficient to show that uniformity or equality between taxpayers was in, and long prior to, 1787, recognized by statesmen, governments and economic writers as an established principle of the first importance in taxation.

The people of the different states (two—Massachusetts and New Hampshire—before the adoption of the Federal constitution) in defining the taxing power of their legislatures, have, almost without exception, inserted in their constitutions provisions giving effect to this principle, the different phrases used being: "Equal and uniform throughout the state," "Uniform upon the class of subjects," Uniform with respect to persons and property," "Uniform and equal rate," "Uniform throughout the state" (Md.), "Proportional taxes," "Proportional and reasonable taxes," "Uniform rules of taxation," "Equalized and uniform throughout the state," "Uniform by general law" (Mo.), "Uniform as to all upon which it operates," "By uniform rules," "Uniform and ad valorem upon all property" (N. C.), "By uniform rule" (Ohio), "Under general laws and by uniform rules" (N. J.), "Uniform" (Oregon), "The rule of taxation shall be uniform" (Wis).

In many cases here "equality" and "uniformity" are clearly treated as synonymous

That it was so understood by the framers of the constitution is strengthened by the fact that when this clause was first proposed in the convention on August 25, by Mr. McHenry and Gen. Pinckney, the words "uniform and equal" were used, but the committee, to which it

was referred on that date, reported it back August 28, omitting "and equal," and this was accepted without debate. (Madison, Journal of Constitutional Convention; Elliott's Debates.)

They who confine this phrase to "geographical uniformity" feel the necessity of admitting that, independent of this clause, a certain degree of uniformity is involved in the word "tax" which Congress could not disregard by laying unreasonably discriminating taxes. But they fail to explain why an affirmative expression of this all important rule was omitted—as they claim it was—from the constitution.

Its framers were close students of the science of government and knew that it had long required uniformity between taxpayers as essential to proper taxation. Unjust taxation had for many years been uppermost in the minds of the people they represented. It was a large factor in leading them to declare their independence of England. These same people—so jealously did they guard the taxing power—had even endangered the success of their struggle for liberty by their refusal to confer upon the Confederation the right to levy taxes. Under these conditions it is incredible that—as some would have us believe—the statesmen who framed, and the people who adopted, the Constitution, intended to confer on Congress, in the very general terms used, the power to tax *without any limitation requiring uniformity among taxpayers*.

Several considerations make this seem more incredible. In the first place, the provision concerning "duties, imposts and excises" deals, not with the states—as in the case of direct taxes—but, like most of the provisions of

the constitution, directly with the individual citizens, and it is a fair inference that they were quite as much concerned in securing uniformity among taxpayers as "geographical uniformity."

Again, the underlying principle of the constitution and our institutions is that all men in their relations to the government and each other are, and are entitled to be, equal. This involves legal favors to none and equal opportunities (under the law) to all in the struggle for personal advancement and trade supremacy. "Geographical uniformity" has no tendency to insure this, while uniformity among taxpayers has.

By a tax of this character, sellers on exchanges—especially those who act only as brokers—are subject to a disadvantage in trade competition (equal to the amount of the tax), the tendency, if not the inevitable result, of which will be to destroy their business.

Furthermore, under the power to impose such a discriminating tax, exchanges, however much desired by or beneficial to the several states, can be driven out of existence. For example, the State of Illinois, believing the Chicago Board of Trade calculated to advance the best interests of its people, granted it a special charter. It has been a leading factor in making Chicago the great grain market that it is. It is an useful element in the internal trade of that state, a trade over which the state has exclusive control. Yet, if this power to impose the present discriminating tax be sustained, this commercial agency—approved and desired by the state—may be destroyed, whenever the agrarian spirit in other states shall grow sufficiently hostile to do so. For it is true—at least within limits which are sufficient, under the

small margins of profit now prevailing in trade—that the power to confine a tax to sales on exchanges implies the power to destroy such exchanges.

McCullough v. *Maryland*, 4 Wheaton, 431.

Weston v. *Charleston*, 2 Peters, 466.

Loan Association v. *Topeka*, 20 Wall., 655

Can it be assumed that the founders of this government contemplated this result?

Again, another purpose of prescribing uniformity in taxation undoubtedly was that thereby a way would be provided for preventing or righting any temporary injustice in taxation. An unjust tax which falls upon all of a class will generally be avoided, or if imposed, give rise to an effective demand for its repeal, while those affected by a partial tax will generally not be numerous enough to resist its imposition or secure its removal.

Again, a tax on a consumable commodity or its sale must be levied on all of that kind of commodity or all sales thereof, to make it fall within the definition of an indirect tax. This is defined to be a tax whose burden, while primarily borne by the one paying the tax, is ultimately (in the case of a tax upon a consumable commodity or its sale) included in the price to the consumer and is thereby indirectly paid by him. But a tax upon some only of commodities of a particular kind, or upon some, but not all, sales thereof will not be included in the price to be paid by the consumer. The cost of production is a large if not ultimately the determining, element in fixing the price to the consumer. The cost of a commodity in its course to the consumer, as well as the cost of selling it,

is a part of this cost of production. But the cost of the commodity or of selling it, which is here involved, is not the cost in the expensive—that is, tax-incurring—market, but the cost in the cheaper—that is—tax-escaping market, just as the cost to the consumer of manufactured articles will be determined by the cost, not when expensively made by hand, but the cost when more cheaply manufactured by machinery. Hence, a tax upon a commodity, when sold in some markets, will not be included in the cost to the consumer, but this will be ultimately determined by the cost of the untaxed commodity and its sale in the cheaper—the untaxed—market. Not becoming a part of the price to the consumer, this tax upon commodities, when sold in some markets, therefore, falls upon the seller and becomes in its character a direct tax. Hence, uniformity—that is, a tax upon all commodities of the same kind, or all sales thereof—is required in the case of, and from the very nature of, an indirect tax upon consumable commodities, and Congress in conferring the right to levy such taxes must be held to have contemplated that kind of uniformity.

In two cases in this court, the meaning of this phrase has been involved:

In *United States* v. *Singer*, 15 Wall., 111, this court in overruling the objection that a tax on distillers was unconstitutional, because not uniform, said:

"The law is not, in our judgment subject to any constitutional objection. The tax imposed upon a distiller is in the nature of an excise, and the only limitation upon the power of Congress in the exposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation; that is, *it is assessed equally upon all manufacturers of spirits wherever they are.* The law does not establish

one rule for one distiller and a different rule for another, but the same for all alike."

In the Head Money cases, 112 U. S., 580, the constitutionality of an act of Congress requiring shipowners to pay a tax upon each passenger not a citizen brought from a foreign port into a port within the United States was attacked upon the ground that it was a tax, and as such was not uniform. The court held it was not the exercise of a taxing power, but of the right to regulate commerce, but added, if a tax it was uniform, saying :

"A tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

We respectfully submit that these cases, re-enforced by the able opinion of Mr. Justice Field on this point in the Income Tax cases (157 U. S., 592-96), present the definition of the phrase "uniform throughout the United States" which will best prevent unjust discrimination in taxes and best contribute to the future welfare of the people. As well said by Mr. Justice FIELD :

"If there be any doubt as to the intention of the states to make the grant of the right to impose indirect taxes subject to the condition that such taxes should be in all respects uniform and impartial, it * * * should be resolved in the interests of justice, in favor of the taxpayer."

But accepting as the requisite, uniformity between taxpayers, its extent and application still remain to be further considered.

In the first place, be it understood that insistence upon such uniformity does not curtail the taxing power. Its enforcement will result rather in the increase of revenue, as it requires a larger number of taxable subjects.

Again, this kind of uniformity does not demand theo-

retical or perfect equality of contribution among taxpayers. Conceding this to be unattainable, it still demands practical uniformity between them. This restriction the people reasonably could—and as we contend, did—impose upon the power of Congress to tax. It does not deny to Congress the power to select the kinds and classes of persons or things to be taxed. It does not require that every person or thing shall be taxed if any are. While the Federal constitution does not—as many state constitutions do—confer the power to classify the subjects of taxation, the right of Congress to select the articles or subjects to be taxed is conceded. But this kind of uniformity does require that, in so selecting, all like things or persons similarly situated shall be included, and that there be some *essential difference* between the persons or things taxed and those escaping the tax. It does exclude discrimination without substantial difference.

See

Pacific Express Co. v. *Siebert*, 142 U. S., 339-53;

Senior v. *Ratterman*, 44 Ohio St., 661,

where, in sustaining discrimination under state constitutions requiring uniformity among taxpayers, the courts found "an essential difference"—"a real tangible difference," between the things taxed and those not taxed.

Unless this limit upon the power to classify exists and is enforced by this court, there are practically no limits upon the power of Congress to tax. The rule of uniformity as a limitation becomes meaningless and the power of this court to prevent unjust taxation or arbitrary discrimination is a mere shadow.

Uniformity between taxpayers as above defined, it is therefore insisted, is required by the constitution in all cases of indirect taxation.

The next question is whether the present tax, if an indirect tax, violates this rule of uniformity. Regarded as a tax on documents, it clearly does. It falls only upon the memoranda of such sales or contracts to sell as are made on an "exchange, board of trade, or other similar place." Memoranda of like sales, etc., made elsewhere escape the tax. Memoranda wherever made are taxed, if representing an exchange transaction. The locality has reference to the sales and not to the memoranda. No distinction can be drawn, either in form or substance, between the memoranda of sales, etc., upon an exchange, and memoranda of like sales made elsewhere—between the memorandum given by George R. Nichols on his sale of hams, and the memorandum he would have given if selling them in his office. Memoranda of sales not made on an exchange will always contain as much as the memoranda under this law are required to contain. *Between these memoranda themselves there is no appreciable distinction*, and uniformity requires that similar documents wherever found should be taxed.

Nor is there this essential difference between the taxed and untaxed things, if we regard the tax as upon the sale or contract of sale itself, rather than upon the memorandum of it. Such a tax, in the case of a cash sale, would be a tax upon the commodity itself when sold, and a commodity when sold on an exchange is the same thing as the same commodity when sold off an exchange. If not, it must be, not because the commodity itself is different—it is not—nor from the fact that it is sold—it is sold in either case, but because in the one case it is sold on an exchange and in the other it is not. Thus the only thing to differentiate the two things is the fact of a sale *on an exchange*. The same is

true of contracts to sell on an exchange and contracts to sell elsewhere.

But what is the feature which discriminates a sale or contract to sell hams, oats, etc., made upon an exchange from a sale or contract to sell such articles when made elsewhere? Certainly not the legal character of the sale or contract itself. The sale by James Nicol of two carloads of oats, and the sale by George R. Nichols of ten tierces of hams, are, in their legal character, identical with sales of like quantities of hams and oats made elsewhere. Either is but an every-day exchange of commodity for price. All are enforced in the same courts and subject to the same remedies of the parties; a breach in either case is followed by the same consequences; the same rule of damages is enforced against the delinquent party. The legal status of the parties in the two present transactions is the same as it would have been, had they made their sales in their offices instead of on an exchange. Hence, as to the legal character of the sale or contract there is no difference.

The petition in the George R. Nichols case avers, and the Solicitor General's return in effect admits, that sales, etc., on an exchange are "identical in their character" with such sales, etc., made elsewhere

But is not the only difference between a sale on an exchange and a sale off it a difference of place where made? But clearly the mere *locality* of the sale of the thing taxed is a purely arbitrary distinction, and does not make two otherwise like things different within the rule requiring uniformity. Congress could not, without violating this rule, tax persons doing business in a city and leave untaxed persons doing like business in smaller places, nor

tax only cigars smoked on exchanges or liquors consumed only in hotels. Nor could it tax sales of grain made on farms and leave untaxed like sales made in cities or on exchanges.

Schedule C of this act imposes a tax on various patent medicines. Could the act have taxed sales of such medicines when made in department stores and leave untaxed like sales make in drug stores? Such taxes would not "operate with the same force and effect in every place where the subject of it is found."

Nor can sales of like articles be distinguished for the purpose of taxation with reference to the facilities or convenience of selling in particular places. A sale in a town is more readily made than a like sale on a farm—a sale in a large city more readily than a sale in a small town. For in the small town as distinguished from the farm, in the large city as distinguished from the small town, there are more buyers, they are more accessible, and they give rise to more competitive bidding, the property is more conveniently handled, and the price is more easily collected because of better banking facilities.

The modern department store is usually conducted upon the plan of a large building owned or controlled by one person or firm, portions of which are sub-let to merchants in different lines of trade, thus by co-operation increasing the facilities of sale by securing economy in advertising, in rent, in delivery, in collection, in book-keeping, and in clerical force. But can it be seriously claimed that because of the better facilities for selling in the town over the farm, in the city over the town, in the department store over the ordinary retail store, a tax could be justified upon a sale in the town when a like sale on

the farm is untaxed, or on a sale in a city when a like sale in a town is untaxed, or a sale in a department store when a like sale in a retail store is untaxed? If not, how can a tax on sales on an exchange be sustained when like sales made elsewhere go untaxed. What is the thing that distinguishes such sales from sales in department stores?

A board of trade is only what its name implies, a place where for convenience business men meet to make with each other the same contracts and the same transactions they could, and frequently do, make in their offices and stores. A farmer may load his stock into a car and take it to the Chicago Live Stock Exchange, there place it (by the payment of a small yardage fee) in pens, and there sell it without charge, although not a member of the exchange. What this farmer thus gains is merely the convenience of selling in Chicago. Will that support this discriminating tax? If persons are to be taxed or go untaxed on their sales solely with reference to the convenience they enjoy in making them, where is it to end? A large corporation or trader always enjoys this advantage over a small one. May their sales for this reason be taxed while those of smaller dealers go untaxed? Is not this such offensive discrimination in the exercise of the taxing power as is well calculated to intensify class feeling, and deprive the citizens of that respect which is so essential to the permanence of any form of government?

We insist that this tax, whether a document tax or a tax on sales and contracts to sell, violates the rule of uniformity.

To conclude: This question of uniformity is one of more than ordinary importance. Its decision here will become a guide for the future, and, according as it is made, it will encourage or prevent an unjust exercise of the taxing power.

Unfortunately, the inequalities of life are becoming daily more marked. The feeling against property rights is one that the demagogue, especially in hard times, appeals to with surprising success. This success will become more marked and more injurious as the proportion of those who have not to those who have becomes—as it will—greater. If this hostility becomes controlling—as it may—in Congress, it will most readily find expression in the exercise of the taxing power. If, in the constitution and the decisions of this court construing it, there is no protection against unjust discriminating taxes, we may well fear for the future of property rights, if not for the future welfare and prosperity of this country and its institutions.

It is respectfully submitted that the present law should be adjudged unconstitutional in requiring these written memoranda and in imposing the tax in controversy, and that in *Nicol* v. *Ames* the judgment of the Circuit Court should be reversed and the appellant discharged, and in the original case in this court a writ of *habeas corpus* should issue to release the petitioner.

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